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JOHN T. FEY,

No. 536

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

T. GEORGE DAVID,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR GENESEE COUNTY, MICHIGAN AND APPENDIX

HOWARD D. CLINE,
FRANCIS J. GEORGE,
Counsel of Record for the Petitioner.
Business Address:
1006 Mott Foundation Bldg.,
Flint 2, Michigan.
Phone: CEdar 2-3141.

JOSEPH & JOSEPH,
Of Counsel.
Business Address:
226 W. Court St.,
Flint 2, Michigan.
Phone: CEdar 4-2655.

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, S.W., GRAND RAPIDS 2, MICHIGAN — PHONE GR. 6-3555



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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

T. George David prays that a Writ of Certiorari be issued to review the final judgment of the Circuit Court of Genesee County, Michigan.

(References to printed record in State Court are marked R).

A.

REFERENCE TO OFFICIAL REPORTS:

Review is sought of the decision of the Supreme Court of the State of Michigan on August 10, 1956, denying application for leave to appeal and of the decision of the Circuit Court for Genesee County, Michigan.

B.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

(i) Review is sought of the judgment of the Supreme Court of the State of Michigan denying application for leave to appeal from a judgment of conviction by the Circuit Court for the County of Genesee and from the judgment of the Circuit Court for Genesee County denying the unconstitutionality of the abortion statute. The order denying application for leave to appeal was entered on August 10, 1956.

(ii) Petitioner was admitted to bail pursuant to an order of the Circuit Court for the County of Genesee.

(iii) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, which provides, in part:

"Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *

"(3) By writ of Certiorari, * * * Where the validity of a State Statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States.

C.

QUESTIONS TO BE PRESENTED FOR REVIEW

1. Does the Michigan Abortion Statute compel defendant to be a witness against himself? Fifth Amendment.

2. Does the Michigan Abortion Statute deprive a defendant of life and liberty without due process of law? Fourteenth Amendment.

3. Does the Michigan Abortion Statute deny defendant of the equal protection of laws? Fourteenth Amendment.

D.

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

The above questions involve the construction and constitutionality of Section 28.204 of *Michigan Statutes Annotated*, and as follows:

> "ADMINISTERING DRUGS, MEDICINES, OR USE OF INSTRUMENTS, WITH INTENT TO PROCURE MISCARRIAGE: PROOF OF NECESSITY. Sec. 14. Any person who shall willfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.
>
> "In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed."

These questions are involved in the *Michigan Constitution* of 1908, Article 2, Sections 16 and 19 and are as follows:

> "SELF-INCRIMINATION: DUE PROCESS OF LAW. Sec. 16. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.
>
> "RIGHTS OF ACCUSED. SEC. 19. In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, * * * to be confronted with the witness against him. * * *."

The Federal Constitution provisions involved are the Fifth and Fourteenth Amendments.

E.

CONCISE STATEMENT OF FACTS

Petitioner was convicted in the Circuit Court for Genesee County for violating the abortion statute above set forth, and was sentenced to pay a fine of Five Hundred Dollars, and Two Hundred Fifty Dollars in costs, or serve six months in the County Jail. Bond was set pending application for leave to appeal in the amount of Twenty-five Hundred Dollars, which was furnished.

Application for leave to appeal was filed in the Supreme Court for the State of Michigan. Leave to appeal is required in all criminal cases and is not a matter of right under the laws of the State of Michigan. The Supreme Court, under date of August 10, 1956, denied application for leave to appeal.

F.

ISSUES RAISED IN STATE COURT

Prior to trial in the Circuit Court for the County of Genesee a motion was made to dismiss based on the unconstitutionality of the statute above described. This motion was denied. After trial, and prior to the judgment of the Court, a motion to dismiss was again made referring to the unconstitutionality of the statute. This motion was also denied and sentence was passed by the Circuit Judge. A motion for a new trial was made, based again upon the unconstitutionality of the statute, and this motion was denied by the Circuit Judge. Application for leave to appeal was filed in the Supreme Court based upon the insufficiency of evidence and the unconstitutionality of the statute, and the Supreme Court of the State of Michigan denied application for leave to appeal.

ARGUMENT

In the original application we requested that the Writ of Certiorari run to the Supreme Court of the State of Michigan, and the respondent, in their brief, state that the petition should run to the Circuit Court for the County of Genesee, and they cite the case of *Panhandle Eastern Pipe Line vs. Calvert*, 347 U. S. 157.

In order to avoid all extraneous argument, we now request and amend our original petition to read "Petition for Writ of Certiorari to the Circuit Court for Genesee County." We believe that the case cited by the respondent can be distinguished.

We believe that this is a substantial and important question and, therefore, request this Court to direct its Writ to either the Supreme Court of the State of Michigan or to the Circuit Court for the County of Genesee.

The statute under which prosecution is brought is as follows:

28.204. ADMINISTERING DRUGS, MEDICINES, OR USE OF INSTRUMENTS WITH INTENT TO PROCURE MISCARRIAGE: PROOF OF NECESSITY, Sec. 14.

> "Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or things whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced the offense shall be deemed manslaughter.
>
> IN ANY PROSECUTION UNDER THIS SECTION, IT SHALL NOT BE NECESSARY FOR THE PROSECUTION TO PROVE THAT NO SUCH NECESSITY EXISTED."

Under the above statute there are two types of abortion.

1. Legal abortion. Necessary to save life.
2. Illegal abortion. Not necessary to save life.

Facts the prosecutor must prove to obtain a conviction:

1. Pregnant woman.
2. Administer drugs, etc.
3. Miscarriage.
4. People rest.

Under the above it then becomes necessary for the defendant to proceed with his proof; the presumption of innocence has disappeared and he must testify or be convicted. In other words, a necessary element of the crime is missing and it is necessary for the defendant to rebut it. We believe this is repugnant to the constitution of the State of Michigan and to the United States constitution.

We have been unable to find any statute similar to this or where this same question has ever been raised before. In the case of *Garcia vs. People*, 213 P. 2d 387, the statute in that case defining larceny continues by saying: "In the prosecution of any person charged with larceny of cattle * * * it shall not be necessary in order to convict the defendant for the people to prove motive, intent or purpose on the part of the accused or to identify the meat * * *." The court in discussing this statute says:

> "At the outset it should be observed that there is no law of Colorado which makes it unlawful to butcher a meat animal and none which makes it unlawful to dispose of the hide of the animal. The statute here considered makes the commission of the two above mentioned lawful acts, prima facie evidence of guilt of the crime of larceny. In other words, if the statute is valid, it is not necessary for conviction for the people to prove 'unlawful intent or purpose;' 'identify the meat with the * * * animal (alleged to be) * * * stolen;' 'prove that any specific animal of any owner, unknown or otherwise, has been lost'; or prove as alleged in the information that defendant did 'unlawfully and feloniously steal' the calf; or that he did 'knowingly kill' it and apply same 'to his own use.' In short, the people were not required to prove the corpus delicti, which, in a larceny case, consists of two elements: '(1) that the property was lost by the owner; and (2) that it was lost by a felonious taking.' "

The court continues by declaring that it is possible to create a presumption providing there is some rational connection or reasonable relation between the fact proved and the ultimate fact to be established. "Also such power is subject to the further limitation that the presumption cannot be made a conclusive one."

> "In Robertson v. People, supra, we considered both the power of the legislature and the limitation thereon as shown by the following excerpt from the opinion, quoted from Board of Com'rs of Excise of Auburn v. Merchat, 103 N. Y. 143, 148, 8 N. E. 484, 57 Am. Rep. 705; 'The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for a trial, would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act prima facie evidence of crime, over which the party charged had no control, and with which he had no connection, or which made that prima facie evidence of crime which had no relation to a criminal act, and no tendency whatever, by itself, to prove a criminal act. * * *' (20 Colo. 279, 38P, 330)."

The Colorado court continues by citing very extensively from the case of *Tot vs. U. S.*, 319 U. S. 463. That case referred to the presumptive evidence that firearms were transported in interstate commerce and the court held that there was no rational connection in either reason or experience between the possession of firearms, being the proven fact, and the transportation in interstate commerce being the ultimate fact presumed, and therefore, the statute was unconstitutional.

Mr. Justice Roberts, who delivered the opinion of the court, stated (319 U. S. 463, 63 S. Ct. 1244):

> "Proof of some sort on the part of the prosecutor is requisite to finding of guilt; it may consist of testimony of those who witnessed the defendant's conduct. Although the Government may be unable to

produce testimony of eye witnesses to the conduct on which guilt depends, this does not mean that it cannot produce proof sufficient to support a verdict. The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference. In many circumstances courts hold that proof of the first fact furnishes basis for inference of the existence of the second.

The rules of evidence, however, are established not alone by the courts, but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance the Act transgresses those limits.

* * * Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference on the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.

* * * It is not too much to say that the presumptions created by the law are violent, and inconsistent with any argument drawn from experience.

Nor can the fact that the defendant has the better means of information standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with

the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.

Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence."

Due process is not a mathematical formula which is the requirement of a fair trial; that kind of trial which is in accordance with our tradition of justice. Notwithstanding the lack of evidence the statute in our abortion case required the defendant to prove his innocence and it is inherent in such a situation that such persons as defendants will have to rely almost entirely on their own testimony and that such testimony is not likely to be believed by the jury. Such a burden of proof is unfair. The statute in our case immediately takes a legal act and says it is illegal.

The Court, in *People vs. Licavoli*, 264 Mich. 643, says:

"Defendants were convicted of having the reputation of engaging in an illegal business or occupation, and therefore, were guilty, in fact and beyond a reasonable doubt, of being engaged in an illlegal business or occupation. The presumption so declared by the enactment is not a rational deduction or inference from fact to fact, but an arbitrary fiat of the legislature. If proof of reputation for engaging in an illegal occupation or business is constituted PRIMA FACIE evidence of being engaged in an illegal occupation or business, and, without more, establishes

guilt, then we are all agreed that the statute is unconstitutional because violative of 'due process of law'."

We wish to call the court's attention that the statute involved in that case provided for a prima facie type of evidence and as Judge Weist says, that is a "Fiat of the Legislature". In other words, in our particular abortion statute this law does not call for a prima facie type of evidence but says to the prosecutor all you prove is facts 1, 2, 3 and rest. The Court in the Licavoli case continues:

"The vice in this statute cannot be sterilized by the emasculation proposed by my Brother. Reputation, without regard to verity, is constituted Prima Facie evidence of guilt — not guilt of having such reputation, but guilt of the specified crime. The statute constitutes it a misdemeanor to engage in an illegal business or occupation, and created repute or hearsay proof of being so engaged, not merely competent evidence, but prima facie evidence of being so engaged and, without more, guilty of being so engaged. The statute constitutes extra-judicial utterances PRIMA FACIE evidence of the ultimate fact of guilt. This takes no cognizance of the generic and strongest presumption known to the criminal law — that of innocence until guilt is established by competent evidence beyond a reasonable doubt.

"But it is said that the statute should be so construed as to permit a jury to accept or reject such evidence. This would take the heart out of the enactment and render it too feeble to operate without substantive evidence. The purpose of the enactment is too plain not to be recognized, and its purpose, manifested by its language, is self-destructive. The statute does not provide for a mere inference from extrinsic, indicatory proof, but constitutes reputation of engaging in an illegal business or occupation sufficient, without more, to convict an accused of the crime of engaging in an illegal business or occupation."

The argument of our local prosecutor is to the effect that it is a simple matter for the defendant to show lack of necessity but the Court in the Licavoli cases says:

> "But it is said that defendants were at liberty to rebut the presumption. This but emphasises the fact that if an accused does not go forward with the proofs the presumption stands, without more, as evidence that he is guilty.
>
> "In STATE V. LAPOINTE, 81 N. H. 227 (123 Atl. 692, 31 A. L. R. 1212), this question was evidently presented, for the Court stated:
>
> 'It is said that so long as the defendant has preserved to him the right to fully present his defense, and then have the evidence weighed, he has nothing to complain of. But the right to make defense is not the whole right secured to one charged with crime, He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of his guilt, and that this evidence shall be weighed by the jury and found sufficient to prove the case. It is his right to decline to produce any evidence and to stand solely upon the proposition that the State must prove a case against him.'" • • •
>
> "In a criminal prosecution, nonaction of the defendant cannot be substituted for action upon the part of the State, as to any matter required to be established as a part of the State's case. Neither the burden of proof nor the burden of proceeding with any evidence to prove such case can be imposed upon the party charged with crime."

The constitutionality of a parking ordinance was before the Michigan Court in the case of *People vs. Hoogy,* 277 Mich. 578.

> "In effect the italicized portion of the ordinance by necessary inference means this: If the accused submits himself as a witness the Prima Facie cause made by the ordinance is overcome, but otherwise (regardless of whatever other testimony than that of the ac-

cused is submitted) the Prima Facie case against him is not overcome. The italicized portion of the ordinance restricts the accused to one class of competent testimony by which the presumption may be met in making his defense, and in so doing bars him from meeting the presumption with other testimony regardless of its competency and probative force. Such an ordinance provision deprives the accused of due process, compels him to be a witness in proceedings wherein he is being prosecuted and is therefore obviously invalid and violative of the Constitution of this State, which provides:

'No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.' Const. 1908, Art. 2, §16."

Again in that case the argument was made that the defendant did not have to testify. The Court quoting from People's brief: —

"• • • This method of repelling the presumption is not exclusive, however. He (the defendant) could produce a witness who could testify to the same effect. He could have an alibi. He could produce any proof which would satisfy the Court and thus overcome the presumption that the owner had control or possession of the car at the time of the violation."

But the Court says: —

"We cannot so construe the italicized portion of the ordinance. Such a construction would be equivalent to saying that the italicized words mean nothing."

The same question was again taken to the Supreme Court in the case of *People vs. Kayne*, 286 Mich. 573, and the Court in that case goes to great length in describing and discussing prima facie presumptions, and the Court says as follows:

"In this State many instances may be cited where by statutory enactment proof of something other than

the direct act charged constitutes PRIMA FACIE evidence in prosecutions for violations of the statute. The following are examples taken at random: Prefixing the word doctor or its abbreviations to one's name is PRIMA FACIE evidence of practicing medicine (2 Comp. Laws 1929, § 6745 (Stat. Ann. § 14.539)), possession of the carcass or skin or any portion thereof of a protected animal out of season is PRIMA FACIE evidence of the unlawful killing of the animal by such possessor (2 Comp. Laws 1929, § 6221 Stat. Ann. § 13.1342)); prohibited appliance for use in fishing found in a boat house on the shore of a lake is PRIMA FACIE evidence of its use in violation of the statute (2 Comp. Laws 1929, § 6380); possession of policy or pool books is PRIMA FACIE evidence of their use by the possessor in the form of gaming prohibited (Act No. 328, § 306, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 17115-306, Stat. Ann. § 28.528)); and likewise possession of unstamped boots or shoes showing the use of imitation leather, if such is the fact, is PRIMA FACIE evidence of intent to sell the same (Act No. 328, § 290, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 17115-290, Stat. Ann. § 28.501)). The validity of these and many other like statutory provisions can be sustained only on the ground that PRIMA FACIE evidence means competent evidence and nothing more." *People vs. Lacavoli*, 264 Mich. 643, 663.

"In cases involving PRIMA FACIE presumptions, when the evidence of defendant is introduced, the burden of proof is always upon the State to prove guilt beyond a reasonable doubt. If such evidence is introduced, the presumption disappears, as a rule of law, and the case is in the jury's hands free from any rule. 5 Wigmore on Evidence (2d Ed.), § 2491. If no such evidence is introduced by defendant, the jury, nevertheless, have the right to find him guilty by virtue of the presumptions."

But the difference in the above cases and in the abortion case is that there is a prima facie presumption; the abor-

tion statute says nothing about a prima facie presumption. *There is an absolute declaration by the statute to the effect that the defendant has to testify; he has to introduce proof to negative the lack of necessity.*

The prosecutor does not have to prove it; therefore, the defendant has to.

Now remember, this man is indicted, charged with a specific crime. It is the duty of the people to prove all the elements of a crime and when the legislature says it isn't necessary for the prosecutor to prove that element, then the duty is shifted to the defendant. His presumption of innocence has gone out of the window.

A very interesting discussion of this is to be found in the dissenting opinion of the case *Crane vs. Waldron,* 133 Mich. 73. That is a civil action and not a criminal action.

The statute that was under discussion in the Waldron case pertained to a change of rules of evidence in cases where bills in aid of execution are filed. The statute provided that the complaint made a PRIMA FACIE case by introducing the judgment, execution and proof of conveyance. The burden of proof then shifted to a bona fide transaction.

That statute is very similar to our criminal statute that is under discussion, only in our case there is no PRIMA FACIE case. It is "A fiat of the legislature" that defendant must proceed with proofs. The Court in the Waldron case quoting from *State vs. Beswick,* said:

> "Indeed, to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very ele ment which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. It is true the accused has the right of defense left to him, and may, if he can adduce satisfactory evidence, rebut the statutory presumptions; but the production of such evidence is not always easy, even with the right to testi-

fy in his own behalf; and the right to testify in his own behalf, having been granted, can be abrogated, by the legislature. It is not one of those great and immemorial rights which lie embedded in the phrase 'the law of the land,' " * * * citing authorities.

The Court continues by saying:

"The legislature cannot declare presumptively honest citizens to be presumptively dishonest, or the daily and presumptively honest transactions of life to be presumptively fraudulent transactions, under the thin guise of a change in the rules of evidence. Every citizen under our Constitution is entitled to the presumption of honesty in his daily transactions, and he who attacks his honesty is bound to prove his dishonesty, and his fraud, before he can deprive him either of his liberty, his property, or his good name. The language of the Supreme Court of the United States, speaking through Justice Chase, in CALDER V. BULL, 3 Dell. 387, is here appropriate:

"I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State. * * * The nature and ends of legislative power will limit the exercise of it. * * * There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power, — as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority."

The Court continues by discussing "due process of law" and says:

"Mr. Webster, in the DARTMOUTH COLLEGE CASE, defines it thus: 'By the "law of the land" is

most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.' DARTMOUTH COLLEGE V. WOODWARD, 4 Wheat. 518.

"I quote with approval the language of Mr. Justice Thomas in a dissenting opinion in COM. V. WILLIAMS, SUPRA:

"If the legislature may say an innocent act is presumptive evidence of guilt, it would be only one step further in the same direction to make that presumption conclusive. * * * Where the act proved equally consistent with innocence or guilt, the presumption of innocence must stand. The plainest dictates of justice require it. The right of trial by jury includes it. A statute which takes from the accused the shield of that presumption essentially impairs that right."

Justice Hughes, in *Bailey vs. Alabama,* 219 U. S. 219; 31 Sup. Ct. 146 said:

"It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumption is not a means of escape from the constitutional restrictions."

We believe that in light of the foregoing, it is necessary for the defendant to testify in order to show necessity or lack of necessity to preserve a woman's life. We believe that this is an infringement upon the constitutional privilege against self incrimination.

As said by Dean Wigmore in his discussion of the privilege:

"Most criminal acts are made up of two or more subordinate facts, each essential to the completed

crime — No one of the component facts constitutes of itself the crime, and yet every one of them must be established in order to establish the crime. It is, therefore, obvious that unless the privilege is to remain an empty formula, easily evaded, its protection must extend to each one of these facts taken separately; as well as to the general whole. It would be immaterial whether the evasion consisted in obtaining from the witness himself all these component facts by separate inquiries, or in obtaining one such fact by inquiry of himself and the remainder by other proof; the difference would be merely in the quantity of evasion; for it would be the witnesses' own disclosure which still would be essential to complete the proof, and his own disclosure would thus essentially involve a criminal fact."

Wigmore on Evidence, Third Edition, Volume 8, Section 2260.

We wish to call the Court's attention that most of the cases arise under statutes that call for a result based upon certain facts or a presumption. The Garcia case above cited is the only statute that we know of that has helped the prosecutor by saying that he does not have to do certain things. In our abortion statute the Michigan legislature has attempted to change the entire duty of the defense.

In re Opinion of the Justices, 15 N. E. 2d 662, a bill was filed to obtain a declaratory judgment from the Justices of the Supreme Court of the State of Massachusetts. The proposed statute in that case authorized the Court to allow the jury to consider defendant's failure to testify if the Court was satisfied that the defendant, if not guilty, could truthfully contradict material evidence as to his guilt.

The Justices in that case said, "Under our system of jurisprudence the Government has no right to interrogate a person accused of crime or to compel him to testify, but must sustain its charge by independent evidence. The accused has the right simply to deny his guilt, and to rely upon the legal presumption of his innocence until proved guilty. And this Court has decided that such silence can-

not be taken into consideration by the jury in deciding whether a defendant is or is not guilty.

"Exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principal that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other form of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions."

LEGALITY OR ILLEGALITY

There is a presumption in favor of legality and of intent to comply with the law.

There is a presumption in favor of legality and compliance with the law, and against illegality; conversely, there is no presumption in favor of illegality, or violation of statute, or against legality. In other words, facts consistent with legality are presumed to exist and where a situation is explainable on the basis of legality it will be assumed that such is the true explanation. These principles present a rule of administration that he who claims the existence of illegality must prove it. 31 *C. J. S.* 769.

CONCLUSION

We submit that the statute under which the prosecution is based is unconstitutional and it imposes upon the defendant the burden of proceeding with his proof. That the facts as presented by the prosecution without any testimony would result in a verdict of guilty; that the statute does not attempt to create a presumption but creates an absolute rule of law that says that if certain facts are proven the defendant is guilty unless he testifies. We agree with the cases that say that a reasonable presumption could result from facts as testified to but in this case there is

no presumption. There is an absolute rule of law. The presumption of innocence even disappears, and there is in effect an illegal conclusion drawn from the facts.

When a set of facts are presented to a Court or jury, should there be a presumption that says that those facts always lead to fraud or to guilt?

We submit the rules of evidence requiring that a conclusion be drawn of innocence and fair dealing, rather than of fraud or guilt.

Respectfully,

T. GEORGE DAVID,
Petitioner.
By HOWARD D. CLINE,
FRANCIS J. GEORGE,
Counsel of Record for Petitioner.

JOSEPH R. JOSEPH,
Of Counsel.

APPENDIX

OPINION UPON RENDERING JUDGMENT SOUGHT TO BE REVIEWED

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventh day of August in the year of our Lord one thousand nine hundred and fifty-six.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,
EDWARD M. SHARPE,
TALBOT SMITH,
GEORGE EDWARDS,
EMERSON R. BOYLES,
HARRY F. KELLY,
LELAND W. CARR,
EUGENE F. BLACK,
Associate Justices.

The People of the State of Michigan,
Plaintiff,
vs. 46969½

T. George David,
Defendant.

In this cause an application is filed by defendant for leave to appeal from the judgment and sentence of the Circuit Court for the County of Genesee and a brief in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the court, It is ordered that the application be and the same is hereby DENIED.

STATE OF MICHIGAN — SS.

I, Hugh H. Carpenter, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court

in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 10th day of August in the year of our Lord one thousand nine hundred and fifty-six.

Hugh H. Carpenter,
Clerk.
By D. L. Winters,
Deputy Clerk.

(SEAL)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. ——

T. GEORGE DAVID,

Petitioner

vs.

STATE OF MICHIGAN

Respondent.

Petition for Writ of Certiorari to the Circuit Court For Genesee County, Michigan

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

A

Opinion Below

Since Counsel for Petitioner has not included in the certified record excerpts from the transcript of record in the Circuit Court for Genesee County, Michigan, showing the manner in which the legal issues were raised and argued, we have included as Appendix "A" the legal issues raised by petitioner in the trial court and argument thereon.

We have also included as Appendix "B" motions and rulings by the trial court on May 2d, 1955, and as Appendix "C" motion for new trial May 21st, 1956.

B

Jurisdiction

We oppose jurisdiction here for the reason that in the Circuit Court for the County of Genesee, Michigan, only questions of local law were raised and decided and no substantial federal question is involved.

C

(Counter-Statement of Questions to be Presented)

A mere reading of the excerpts from the transcript of the record in the trial court, the motions and rulings by the trial court on May 2d, 1955 (Appendix B) and the motion for new trial May 21st, 1956 (Appendix C) clearly demonstrate lack of the timely raising in the trial court and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them; and the way in which they were passed upon by the trial court with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari, so that our Counter-Statement of Questions Involved is Did the Circuit Court for the County of Genesee, Michigan, decide a federal question of substance contrary to the applicable decisions of this Court?

D

Constitutional provisions and Statutes

The abortion statute is properly cited on page 3 of the petition and Art II §§ 16 and 19 of the Michigan Constitution and the Fifth and Fourteenth Amendments of the Federal Constitution.

E

Counter-Concise Statement of Facts

It appears from application for leave to appeal filed in the Supreme Court of Michigan, and which was included in our Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Michigan already on file in this Court, that petitioner, a medical doctor, was arrested, charged with a criminal abortion upon one Lois Morgan. An examination was had and the respondent was bound over to Circuit Court for trial. A motion was made to dismiss in the Circuit Court for Genesee County based upon the fact that there had been no showing that a crime had been committed; no showing of probable cause, which the Circuit Court overruled.

It further appears from application for leave to appeal to the Supreme Court of Michigan that trial by jury was waived, and also a motion made to dismiss, based upon the unconstitutionality of the statute, and also based upon the fact that the prosecution was not based upon the proper statute. The Circuit Court denied this motion.

F

Issues Raised in State Court

Since Counsel for Petitioner do not show the manner in which the claimed federal questions were raised in the trial court, we have included in Appendix "A" here, commencing on page 131 of the transcript of record, counsel's position in the trial court:

> "Now, briefly, it is our position there has been no proof of pregnancy in this case, there is no proof introduced in this case to show the respondent had anything to do with it; third, that the complaint as originally issued is defective; four, the statute under which the prosecution is brought is unconstitutional, and fifth, it seems to me this later section is the one that we should be proceeding upon and not the other one. And I again urge upon this Court that the prosecutor has (*sic*) filed to proof the essentials of the crime of abortion."

II

Argument

While we will discuss later the establishment of a prima facie case in criminal proceedings, and as we claim here that the Legislature of Michigan has made a valid and constitutional exception in the statute in controversy here, and which appears to be the applicable federal rule as appears later herein, it is elementary that in the issues raised in the trial court, *supra,* that

> "four, the statute under which the prosecution is brought is unconstitutional,"

is a far cry from the timely raising of a substantial federal question and is too vague to merit the exercise of the discretion of this Court.

In Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 86, p. 153, it is stated in part:

> "It is not sufficient to claim in the record that 'due process' is violated without reference to the federal Constitution, when the state constitution also includes a due process clause. On the other hand, it may be enough to refer to the words of the Fourteenth Amendment when the state constitution contains no similar article. But it is insufficient to object merely on the ground that a statute of a state is 'unconstitutional', 'unconstitutional and void', denies 'constitutional rights', or the like. Such objections are regarded as referring to the power of the state legislature under the state constitution."

The state constitutional provision on due process is cited on page 3 of the petition for certiorari here.

The questions raised by petitioner in his argument, page 5 are discussed in detail in Vol 4 Wigmore on Evidence, (3d Ed) § 1356, p. 724, and the authorities are collated in 162 A. L. R. 495, *et seq.* At p. 501 of this annotation it is said:

> "The contention that a criminal statute making one fact presumptive evidence of another is unconstitutional in casting upon the accused the burden of going forward with the evidence and negativing the presumption, thus compelling him to be a witness against himself, was well countered in *People* v. *Jackson* (1937) 280 Mich 6 where the Court quoting from *Yee Hem* v.

United States (1925) 268 U. S. 178, said: 'Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute. The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing.' "

We think the New York Court of Appeals properly distinguished the case of *Tot* vs. *United States,* 319 U. S. 463, in the recent case of *People* vs. *Terra,* 303 N. Y. 332, where that Court sustained a section of the penal law of New York providing that possession of a machine gun (except by police and other designated classes of persons in the discharge of their official duties) is a felony and that the presence of such machine gun in any room, dwelling, structure or vehicle shall be presumptive evidence of its illegal possession by all persons occupying the place where such machine gun is found. On page 335 of the official report it is said.

"The validity of a presumption statute, the permissibility of the presumption created, depend, therefore, upon whether, based on life and life's experience, a rational connection between the fact proved and the ultimate fact presumed may be said to exist. (See *People* v. *Pieri,* 269 N. Y. 315, 324; *People* v. *Cannon, supra,* 139 N. Y. 32, 42 *et seq.; Tot* vs. *United States,*

supra, 319 U. S. 463, 467, 468; *Morrison* vs. *California*, 291 U. S. 82, 90; *Manley* vs. *Georgia*, 279 U. S. 1, 5-6, 7; *Casey* vs. *United States*, 413, 418; *McFarland* vs. *American Sugar Co.*, 241 U. S. 79, 86; *Luria* v. *United States*, 231 U. S. 9, 25; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 82; *Bailey* v. *Alabama*, *supra*, 219 U. S. 219, 238.) • • • the fact upon which the presumption is to rest must have some fair relation to, or natural connection with the main fact (*People* vs. *Cannon*, *supra*, 139 N. Y. 32, 42); what is proved must be so related to what is inferred • • • as to be at least a warning signal • • • experience must teach that the evidence held to be inculpatory has at least a sinister significance (*Morrison* vs. *California*, *supra*, 291 U. S. 82, 90). • • •

"On the basis of somewhat similar reasoning, the Supreme Court of the United States has upheld the validity of a statute providing that the existence of a liquor still upon 'real estate' constitutes prima facie evidence that those 'in actual possession' of the land knew of the location of the still and may, on the strength of that presumption, be held guilty of the crime of permitting a still to be operated upon their property. (See *Hawes* vs. *Georgia*, 258 U. S. 1). And this Court has today reaffirmed the constitutionality of section 1898-a of the Penal Law, which recites that the 'presence in an automobile' of any gun or other designated weapon 'shall be presumptive evidence of its illegal possession by all the persons • • • in such automobile at the time such weapon • • • is found.' (See *People* vs. *Russo*, 303 N. Y. 673; *People* vs. *Gerschinsky*, 281 N. Y. 581. If such statutes are constitutional—one presuming knowledge of a still from possession of perhaps a large area of land and the other presuming possession of a gun from mere presence in

an automobile—then *a fortiori* a provision declaring possession of a gun inferable from occupancy of the room where it is found, is reasonable and valid. • • •

"The section 1897 presumption, with which we are concerned, is to be contrasted with subdivision (f) of section 2 of the Federal Firearms Act, declared unconstitutional in *Tot* v. *United States, supra* (319 U. S. 463). That provision prescribed that the possession of a firearm by any person who has been convicted of a crime of violence or is a fugitive from justice shall be presumptive evidence that the article was received by him *in* interstate commerce *after* the effective date of the statute. Absence of a rational basis for such an inference is a patent as is existence of a reasonable connection between actual possession of a machine gun and its illegal, guilty possession.

"The statute here challenged visits no oppressive burden upon an accused. It gives him every opportunity to rebut the presumption—for which, as we have seen, there is fair and reasonable basis—merely calling upon him to explain the highly sinister and suspicious proof that a death-dealing machine gun was found in a room occupied by him. And, even if he offers no explanation, the jury may still refuse to convict. The burden of proof upon the entire case, the duty of establishing guilt beyond a reasonable doubt, remains as ever with the prosecution. Defendant's right to a fair trial continues undiminished; no hardship is imposed, no constitutional right or safeguard impaired."

This Court in Docket No. 552, October Term, 1951, dismissed the appeal for the want of a substantial federal question, 342 U. S. 938.

Likewise it is our view that the Legislature of Michigan had the undoubted power to provide as it did in § 28.204 Michigan Statutes Annotated (Henderson) defining the crime of abortion, the provision:

> "In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed."

Any reputable medical practitioner would be quick to take the stand and testify that he procured the miscarriage of a woman and that the same was necessary to preserve the life of such woman.

In practically every criminal prosecution the defendant is required from necessity to rebut the effect of the evidence offered against him and frequently, where there is no other rebutting witness but himself, to an incriminating fact or circumstance, the necessity of the situation compels him to take the witness chair.

It is also our view here that the Michigan statute in question creates a valid and constitutional exception and this appears to be the applicable federal rule. In *Williams* vs. *United States of America,* 78 App DC 147, 138 F2d 81, 153 A. L. R. 1213 (followed in *Peckham* vs. *United States,* 210 F2d 693, 697, cert den 350 U. S. 912) it was *held, inter alia* that where the facts relating to an exception in a criminal statute are difficult for the state to obtain and are at the same time peculiarly within the knowledge of the defendant, the exception is usually considered as a defense or justification and not as part of the description of the offense itself so as to impose upon the State the burden of proof to establish the fact that the defendant is not within the exception. And further, that the exception "unless

when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine," following the specification in an abortion statute of the acts constituting the offense was intended to furnish the defendant an opportunity for justification and does not constitute a part of the description of the offense itself so as to impose upon the prosecution the burden of proving that the defendant is within the exception. There is an extensive annotation following this case commencing on page 1218 of the A. L. R. report. At page 1278 of the annotation it is said:

> "Decisions holding, as to the particular statute, that an exception in a distinct substantive clause, though in the enacting section, need not be noticed in the prosecutor's pleading are as follows:
>
> *McKelvey* vs. *United States,* 260 U. S. 353,
>
> *Green M. & Co* vs. *United States,* 19 F2d 130, cert den 275 U. S. 549,
>
> *Lynch* vs. *People* (1868) 16 Mich 472,
>
> *People* vs. *Richmond* (1886) 59 Mich 570,
>
> *People* vs. *Allen* (1899) 122 Mich 123."

The rule is also well stated in *7 Fifths Old Grand Dad* vs. *United States,* 158 F2d 34, 36, cert den 330 U. S. 828:

> "Further, when a criminal statute sets forth an exception, which exception is not a part of the crime, but operates to prevent an act otherwise included in the statute from being a crime, the burden is on the defendant to bring himself within the exception * * *."

To the same effect:

Green Moore & Co Inc vs. *United States*, 19 F2d 130, 131 cert den 275 U. S. 549,

Taylor vs. *United States*, 19 F2d 813, 816,

Taylor vs. *United States*, 142 F2d 808, 814, cert den 323 U. S. 723.

This question is also expertly discussed in Vol 9, Wigmore on Evidence (3d Ed) Section 2486, page 274 *et seq.*, and 1955 Pocket Supplement, *Id.*

III

Conclusion

There has been here no collision with Federal rights guaranteed to petitioner under the Fifth and Fourteenth Amendments to the Federal Constitution and no substantial federal question is involved, and therefore the petition for certiorari should be denied.

Respectfully submitted,

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General of the State of Michigan
Counsel for Respondent
The Capitol,
Lansing 2, Michigan.

APPENDICES

Appendix "A"

Excerpts from transcript of record in trial court.

MR. O'ROURKE: The People at this time offer to the respondent the witnesses endorsed upon the information, or that we might call them for his cross examination.

MR. JOSEPH: You rest then?—We don't care to have any witnesses.

MR. O'ROURKE: People rest.

MR. JOSEPH: Can I have about a ten minute intermission because I want to get some books together, and I want to make a motion.

THE COURT: Alright.

MR. O'ROURKE: Your Honor, I will withdraw my rest, as long as we are going to have a ten minute intermission that will give me sometime to consider the matter also.

THE COURT: Alright, take a recess.

(Whereupon a recess was taken)

MR. O'ROURKE: Having offered the witnesses on the information to the respondent, it being my understanding the respondent does not desire to call any of the People's witnesses endorsed on the information, the People now rest.

MR. JOSEPH: Your Honor, I move you at this time that the complaint and warrant and the information based thereon be quashed and the defendant be discharged for the following reason: First, there has been no proof that

a crime has been committed in this matter. Second, there has been no proof to lead one to believe that the respondent as charged did commit that crime. Third, there is no proof offered in this Court that a proper complaint and warrant has ever been issued. Four, that the statute in this case made and provided is unconstitutional. Five, that there has been another statute passed in this case which we believe covers the matter in dispute, and that this is not the proper tribunal to try a violation of law that the People claim in this Court.

First I would like to go into the question as to the validity of this complaint. This complaint evidently is based upon the—or the original complaint is that made by Robert Corrington. It is sworn to. Frankly, your Honor, our Supreme Court, and as late as the People vs. Davis (?) has held that a complaint that is duly irregular upon its face cannot be impeached or attacked in any proceedings. That when it is once issued it is absolute. The Supreme Court in the case of Davis, People vs. Davis, enunciated that rule.

They base that also upon the case of People vs. Mosely, but it seems to me, your Honor, that justification to attach, there must be a showing of probable cause before the examining magistrate, to justify that examining magistrate to issue a warrant. In this case the complaint is made by Robert Corrington. The defendant is not given an opportunity to appear to examine witnesses, or cross examine the complainant. The complainant, from his testimony as given here, clearly establishes his testimony is that of hearsay and would not be sufficient to bind this man.

My next motion that I make, and I might as well make them all so that the Court can discuss them in detail or separately, as he pleased,—I claim there has been no showing that a crime has been committed in this case. The

testimony in this case is that of Lois Morgan, followed by that of Mr. Duprey, and then with doctors, and of so-called exhibits. It is our position that those exhibits do not rise to the dignity of evidence so they could be binding upon the respondent in this matter.

My next motion I make is that under the statute, and the statute in this case is very peculiarly worded,—can I see the information, Jerry, please?—Oh, there is one more point I would like to make. The information as filed by the prosecutor says:

> "Did then and there feloniously and wilfully use and employ upon the person of Lois Morgan a pregnant woman, a certain instrument, to wit: a metal object, by then and there inserting such instrument into the private parts of the said Lois Morgan, with intent thereby to produce the miscarriage of the said Lois Morgan, the same not being necessary to preserve her life, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan."

There has been no proof offered in this case, your Honor, that whatever was done by the respondent was not necessary to preserve her life. Evidently the prosecution proceeded upon the theory that is based in this statute, and it is based upon Sec. 28.204 of MSA, and the information practically follows the wording of the statute. I would like to call the Court's attention to it.

> "Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same

shall have been necessary to preserve the life of such woman, shall be guilty of a felony,"

—and

"In any prosecution under this section it shall not be necessary for the prosecution to prove that no such necessity existed."

Now, evidently the prosecutor is relying upon the statute when he says it is not necessary for him to prove that no necessity existed for the acts that they claim the defendant did.

In this case, without conceding that anything was done, and we further allege there has been no proper proof of pregnancy before this Court,—without conceding that any act has been done, the prosecutor has now shifted the entire proof, the entire proceedings, the entire go-ahead in this case from himself to the defendant. In other words, this statute says there are two types of abortion that could be committed,—one, an abortion that can be committed upon a pregnant woman if it is necessary to preserve her life; second, an abortion that isn't necessary to preserve her life. There are two distinct spheres of crimes or of acts that are defined.

Now, under the case as it now rests, if the Court is to believe that this woman was pregnant, if the Court is to believe that she lost her child, then the duty now rests upon the defendant to take the witness stand and say, "I did or did not do such a thing." In other words, the presumption of innocence has now gone out the window. And further, the proceedings is now upon the defendant to counter-act the reactions or the implication of all of these facts that have been developed by the prosecutor. The

prosecutor sits back now and says, "My duty is done. You prove whether it was necessary to preserve her life or not. That duty is not mine." That is contrary to all the principles of American Jurisprudence in that our defendant is presumed to be innocent, and that presumption abides with him throughout the entire trial, and that no facts can be imputed to him, that the prosecutor must prove it. It is an essential part of this case that the prosecution prove these elements.

Now, there has been one case in which this question has been discussed, but the Supreme Court does not really touch upon the question, and that is the case of People vs. Southwick, 272 Mich. at page 258. Incidentally, your Honor, I might state this, that the constitutionality of this particular statute has never been passed upon, as far as I can find, by our Supreme Court. The constitutionality of a statute similar to this I cannot find has ever been passed upon by the Supreme Court of any State of this Union. The abortion statutes seem to differ, and there are as many different abortion statutes as there are States.

Now, in this case, in the case of People vs. Southwick, the charge was manslaughter caused through abortion, and this is the only discussion of this very question. The Court, speaking at page 265, they say:

> "The act under which appellant was prosecuted provides:" and they read the statute the same as I read it to you.—"Under this section the people were not required to prove the lack of necessity to preserve life and a failure to allege it did not deprive defendant of his constitutional right to be informed of the nature of the accusation. The original information set out all the elements constituting the offense."

That is all they say on that question in that case, your Honor, but I can't help but feel that now the presumption of

innocence is gone, and further our proof now arises upon us to proceed, and I therefore say, the act is unconstitutional.

There is one case I would like to call the Court's attention to, and that's the case of People vs. Hoogy, H-o-o-g-y, 277 Michigan at page 579. That, your Honor, pertains to an ordinance passed by the City of Detroit to people who park their cars upon the streets of the City of Detroit, and who were ticketed. Your Honor, that case goes on to say that—and the Supreme Court underlines these words,

> "If at any hearing or proceeding the owner shall testify under oath or affirmation that he was not operating the said motor vehicle,"

—and they go on and say what the operator should do to avoid the responsibility of this particular city ordinance. Now, in considering the underlined portions of the ordinance, by necessary inference means this,—if the accused submits himself as a witness, the prima facie case made by the ordinance is overcome; and if he does not, the prima facie case against him is not overcome, and the ordinance provision deprives the accused of due process, compels him to be a witness in a proceedings wherein he is being prosecuted, and is therefore obviously invalid and violative of the Constitution of this State, which provides that

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

Now, counsel for the City says,

> "Well, that isn't true. The defendant could overcome the presumption by proving an alibi. He could

have an alibi; he could produce any proof which would satisfy the court and thus overcome the presumption that the owner had control or possession of the car at the time of the violation."

The Supreme Court says,

"We cannot so construe that portion of the ordinance; such a construction would be equivalent to saying that the italicized words mean nothing. And further, it may be noted that in cases wherein alleged violations of the ordinance are tried before a jury of necessity the provisions of the ordinance will be placed before the jury. In such cases defendants who did not appear and testify, as the ordinance provides, would necessarily be prejudiced by the terms of the ordinance. In our judgment the constitutional right to a fair and impartial trial would be violated."

Now, the same question later came up before the Supreme Court in the case of People vs. Kayne, 286 Mich. 574. There they passed the same ordinance, but they changed the procedure, and they said that a car that is registered in A's name is prima facie evidence that A drove the car. Now, in that case the Supreme Court discusses the relationship of prima facie evidence to the duty of the defendant to prosecute, and there is a long discussion, and it is a long case; and in that case the Supreme Court says that in view of the fact the vast majority of the people who own cars, operate their own car, it would not be an unreasonable burden to place upon the defendant if he were required to take the stand and disprove it.

But in this case, your Honor, it isn't even a presumption, it isn't even a prima facie case. This statute says if you do this without it being necessary to preserve the life of such

a woman you are guilty of a felony. It does not say there is a correlation between the acts as committed by a person and the results to be imposed upon him. It makes an absolute finding.

Now, the prosecutor has followed the wording of that statute implicitly. Under his theory he has proven the woman is pregnant; under his theory he says that woman says an operation was performed, therefore you are guilty. Now, that's what he says; and he says under the statute I do not have to prove that it is necessary, or not necessary to preserve her life.

I claim, your Honor, there is a duty upon the prosecution, and that the prosecutor's duty is to prove all the elements of a crime beyond a reasonable doubt before he can hope for a conviction.

Now, there is the People vs. Licavoli case, 264 Mich. at page 643. I think the Court is very familiar with that case because in that case the law was passed saying that a disorderly person, if you don't have means of attack,—

> "Proof of recent reputation for engaging in an illegal occupation or business shall be prima facie evidence of being engaged in an illegal occupation or business."

The Supreme Court says,

> "If proof of reputation for engaging in an illegal occupation or business is constituted prima facie evidence of being engaged in an illegal occupation or business, and, without more, establishes guilt, then we are all agreed that the statute is unconstitutional because violative of 'due process of law,' of the Consti-

tution of the United States and of the Constitution of the State of Michigan."

"The vice in this statute cannot be sterilized by the emasculation proposed by my Brother. Reputation, without regard to verity, is constituted prima facie evidence of guilt—not guilt of having such reputation, but guilt of the specified crime."

"The statute does not provide for a mere inference from extrinsic, indicatory proof, but constitutes reputation of engaging in an illegal business or occupation sufficient, without more, to convict an accused of the crime of engaging in an illegal business or occupation."

"If this enactment is held valid, then a like rule of evidence and inference and prima facie presumption of guilt may be made applicable to cases of felony."

The Supreme Court goes on and says,—you just can't do that. Now, I would like to present to this Court a case of abortion, a statute involving an abortion, a statute which has this same language, but yet where the Supreme Court has said that it is constitutional, or unconstitutional; unfortunately I cannot find such a case. There is one more point I would like to call the Court's attention to, and that is that I feel this section of the statute is not applicable to the crime as charged to this respondent, and the reason I say that is that this law under which he is proceeding was passed in 1846; in 1899 chapter 120 of Medicine and Surgery was passed. Some fifty years later Boards of Registry, it sets up, meetings of officers, registration procedure, examination of doctors, registration, perjury and penalty. It is quite a conclusive statute, and then the sixth section is this:

"A Board of Registry of Medicine may refuse to issue or continue a certificate of registry or license

provided for in this section to any person guilty of grossly unprofessional and dishonest conduct."

It was under the dishonest conduct as used in this act,—the procuring, aiding or abetting and procuring a criminal abortion. There are several other sections. Seventh section:

"It shall be a misdemeanor for any person to be guilty of any unprofessional and dishonest conduct as defined in this act."

"Any person who has been issued a certificate of registration or license by this act, and who shall be charged with the commission of a misdemeanor, shall be tried in a court of competent jurisdiction and upon conviction thereof shall be fined for each offense a sum not to exceed $250 or imprisonment in the county jail not to exceed three months, or it may be both fine and imprisonment, in the discretion of the Court. The — of any misdemeanor by this Court shall not be construed to supersede any existing remedy or punishment, whether civil or criminal, for any act embraced within the provisions of this act, but shall be construed to be in addition thereto."

That's what that act says. But it seems to me that under the rule of construction of the statute that the legislature some fifty years later pre-empted the subject of abortion by any person, and comes back to that under medicine(?)—and then they passed a federal act and they covered the entire field of responsibility of a licensed physician, he or any other person, and they set up in that section of the statute what the penalties are if he should violate any of their rules.

Now, it is my position this Court is not the proper Court to try this kind of an offense; that this is not a felony; that at most it is a misdemeanor.

Now, briefly, it is our position there has been no proof of pregnancy in this case, there is no proof introduced in this case to show the respondent had anything to do with it; third, that the complaint as originally issued is defective; four, the statute under which the prosecution is brought is unconstitutional, and fifth, it seems to me this later section is the one that we should be proceeding upon and not the other one. And I again urge upon this Court that the prosecutor has *(sic)* filed to *(sic)* proof the essentials of the crime of abortion.

MR. O'ROURKE: Your Honor, arguing for the People, we would urge the Court that all allegations contained in the complaint and warrant, and in the information, have been established, and that the argument of counsel concerning the propriety of the complaint and warrant is taken care of by the case he cites, People vs. Davis, just the opposite of what he is arguing. He does not think it is right, but he admits the Supreme Court says that's the law.

The constitutionality of the section is an act, I believe, is presumed to be constitutional, in that, as he points out, it has never been held unconstitutional, and the legislative act there does not allege any ground for its being unconstitutional, other than an implying that perhaps the fact the people don't have to prove necessity, or a lack of necessity, would be unconstitutional; and he cites cases that have to do with the presumption, or set up certain acts as giving rise to a presumption in the criminal law that those acts so held to be unconstitutional, and this act does not do anything of that sort.

It is not necessary for the People to prove that there was a lack of necessity for the abortion, and the People say to his second or later argument concerning the impropriety, or this being an improper tribunal,—I think that answer is another argument by the wording of the statute, and that it does not take the place or supersede any other acts that previously existed; and we would urge the Court that all motions, all arguments and all the motions by Mr. Joseph be denied.

THE COURT: To take the motions made on behalf of the respondent more or less in sequence fashion, your argument, Mr. Joseph, respecting the matter of the complaint and warrant, and the sufficiency of the proceedings before the magistrate before the issuance of a warrant are, of course, pretty comprehensively and conclusively disposed of by the case of the People vs. Davis, which was tried in this Court and appealed to the Supreme Court, and affirmed there. As a matter of fact, the Davis case, the language employed by the Supreme Court, with which I fully agree, goes farther than any other case which has ever been handed down on that problem.

My recollection is that in previous cases the Supreme Court has sometimes escaped through the back door, the requirement for oral examination in addition to the written complaint, but I believe that my reading of the Davis case has brought me to the logical conclusion that once a complaint valid on its face is presented, that that in itself suffices to clothe the magistrate with jurisdiction to issue a warrant for the arrest of a person charged or complained against.

With respect to your argument concerning the unconstitutionality of the act on two grounds, one, that it is invalid because the field was pre-empted by the statute you re-

ferred to, which had to do with the practice of medicine and the conduct of the health arts of the various types, and the other that it places upon the person charged with the crime of abortion an unconstitutional burden of negativing, that is, of proving that it was necessary to perform the operation in order to preserve life,—with respect to the first, I merely say that I believe your ground untenable. I believe the statute with respect to the claim of having already been occupied by the previous enactments of the legislature will not hold water.

With respect to your other argument that it is invalid because it places upon the defendant the burden of proving his innocence with respect to one of the necessary elements, I draw a considerable distinction between the analogies you have tried to use under this statute. They are, for example, the parking situation. It cannot be said that a parking case is on anywhere near all fours with an abortion case, and in an abortion case you are not saying to the defendant, "Prove yourself innocent." What you are saying is, if you have a defense, which defense is that you had to perform the operation in order to preserve life, then that is what it is. It is a defense and he must go forward with it and assume the burden, but it pre-supposes the prosecution has proven beyond a reasonable doubt the other elements of the case, which is not true in a parking situation. For example, it would be necessary, without considering this element, to show beyond a reasonable doubt various elements. One, the matter of pregnancy; two, the performance of an abortion, inducement to bring about an abortion either by means of instruments or drugs, or some other means. Is then not the requirement of the defendant to assume the burden with respect to this matter of preserving life not like the defense of self defense in cases of assault, or murder, or homicide, or justifiable homicide, in the case of a homicide charge?

I would assume that if such a defense was brought forward that the burden remains with the prosecution just as it does in the case of self defense in a murder case. Once the defense is raised, evidence in support of it put forward by the trier of the facts, and whether it is a jury or the Court, then the burden shifts to the People or the prosecution to establish beyond a reasonable doubt that the respondent did not act in self defense; and so it would be in this case. Were the defendant in this case to present the defense that it was necessary to perform this operation in order to preserve or protect the life of the complaining witness, then the burden would shift to the prosecution to show beyond a reasonable doubt that such was not the case.

There has been no positive evidence offered by the prosecution on that point, that is, to negative the need for an abortion. But the logical deduction from the testimony in the case is that the complaining witness, the witness Lois Morgan, but for her pregnant condition, was in good health.

So far there is nothing before the Court in the way of evidence to demonstrate any necessity for the performance of an abortion, except to avoid the natural consequences of pregnancy, and that is the birth of a child.

From what I have already said, it must be apparent that the major point you raise with respect to the question of an operation necessary to preserve life, first, the Court feels that the act is unconstitutional, and second, that if that portion of the act is not constitutional, that the evidence in the case already negatives the need for such an operation. Your motions severally are denied.

Appendix "B"

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

THE PEOPLE OF THE STATE OF MICHIGAN —vs— T. GEORGE DAVID, Respondent.	No. 14367

PROCEEDINGS HAD in the above entitled cause, before the HON. STEPHEN J. ROTH, Circuit Judge, on the 2nd day of May, 1955.

APPEARANCES: MR. JEROME F. O'ROURKE,
Prosecuting Attorney,
for the People,

MR. JOSEPH R. JOSEPH,
Attorney for Respondent.

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MR. O'ROURKE: If it please the Court, this is criminal case 14367, People of the State of Michigan against T. George David. Mr. Joseph Joseph has filed motions in it and I would like to have them argued now, if we might.

MR. JOSEPH: Your Honor, the facts of this case are briefly as follows: The defendant was arrested and charged with the crime of abortion. The facts as disclosed

before the Examining Magistrate are substantially as follows: A young man goes and sees the doctor; he later comes back with this girl, and the fee set is at $500. The girl is taken there and something is done to her, and later the doctor is arrested on the crime of abortion.

We filed three motions in this case during the last term of court. We first set up there was no showing of probable cause, there was no showing a crime had been committed; that our rights of cross examination had been badly limited by the Examining Magistrate; and we also filed a motion—

THE COURT: Let's outline your motions so I have them in mind.

MR. JOSEPH: Alright.

THE COURT: What motions do you have?

MR. JOSEPH: Motion to quash; that no proof of the crime has ever been shown in the lower court; there has been no showing of probable cause before the Examining Magistrate.

THE COURT: What are your other motions?

MR. JOSEPH: Then we had a motion to remand for further examination.

THE COURT: What else?

MR. JOSEPH: And a motion to compel the prosecutor to deliver to us a certain exhibit for an examination. Now, at the last term of the court the prosecutor and I discussed this matter and he agreed the exhibit would be made available to us, and it has been made available to us, your Honor;

and I promised Mr. O'Rourke I would send him a copy of our pathologist's report, and he promised to give me his copy of the pathologist's report. So far I have not received that.

Now, to go back to the motion to quash, it is our theory there has been no crime proven. Now, in support of that I would like to quote from the testimony, on page 31:

"Q Did you hear Clarence say that to the doctor when you were there?

"A No, I didn't.

"Q Then you don't know what happened until you went in to the doctor and the doctor examined you?

"A Yes.

"Q Is that correct?

"A As best I know.

"Q All you know is you went in there for an examination to determine your physical health?

"A Yes."

On page 33:

"Q Right now you had felt no life?

"A No.

"Q You didn't know what was wrong with you, isn't that correct?

"A I kind of suspected I was pregnant.

"Q You suspected you were pregnant, let's put it that way.

"A Yes."

Page 34:

"Q You just assumed you were pregnant, let's put it that way?

"A Yes."

Clarence Duprey, the young man, was called upon to testify, and he was asked certain questions, and we objected to it.

"A Why did you take Lois Morgan originally to Dr. David?

"MR. JOSEPH: That is objected to, your Honor.

"MR. WRIGHT: He can say why he does something."

Now, the Court says: "He has already stated that the reason he took her there was because they thought she might be pregnant, if that is the answer that you seek.

"MR. WRIGHT: I will ask you if you had any other reasons other than finding out if she was pregnant.

"MR. JOSEPH: I object to that, your Honor. They took her there."

And then Mr. Wright says; "I think it explains his actions. It doesn't explain the doctor's actions."

And the Court says: "He can state why he took her there."

Now, that was the only testimony that was introduced in the lower court. We claim that is not sufficient to justify a finding of pregnancy, which is essential to this case.

Now, in addition to that testimony, we spent a great deal of time—I can briefly summarize,—we have brought in about ten witnesses who would testify to this girl's general reputation in the community in which she resided for truth and veracity, and as to the way she conducted herself. She testified that she was found in bed with a man early one morning, and she also testified she lived with this man at one address for six months. She testified that she had been out with him, and I think the testimony reveals she represented herself as his wife, and yet she swears before the Court that she only had one act of intercourse with that man.

Other witnesses have sworn, who would testify to the effect that they would not believe her under oath; that she was a liar and prevaricator, and so forth.

Now, the Court held most of this testimony is collateral, and limited the defense to the cross examination of witnesses on that very theory, and in fact, we wanted to swear more witnesses to testify as to her general character, her general reputation in the community in which she resided, and the Court says, "No, those are strictly collateral matters and have no basis in this Court."

Now, it is our theory that these are not collateral matters. These are the very matters that are in issue. This tested her truth and veracity, her general reputation in the community, what other people thought of her; if she was a prevaricator, if she was a liar, then we think the Court should have accepted that testimony.

We also feel there was no evidence showing that a crime had been committed. There was no showing of pregnancy. There is only one case I was ever able to find on the subject, and that is in the case of People vs. Southwick, 272 Mich. 258. The Examining Magistrate committed the respondent for trial in the Circuit Court. Now, in that case, your Honor, he had before him the evidence of the pregnancy of the deceased; testimony of competent physicians that she died from Peritonitis, and it goes on and tells about the medical theory, the fact she had visited the doctor and consulted with him. There was much more testimony in this case, your Honor, as to the showing of pregnancy.

Now, the only thing they have in this Court that could be possibly submitted was that she thought she might be pregnant, and your Honor, we feel that that is not a sufficient showing of the crime itself to justify these declarations. We feel too our right of cross examination was unduly limited. "Particularly in a criminal case, questions on cross examination affecting the credibility of a witness' story should not be abridged."

THE COURT: Is that the case that deals with a preliminary examination, Mr. Joseph?

MR. JOSEPH: Well, in that case, your Honor,—

THE COURT: No, answer my question.

MR. JOSEPH: I don't know whether there was any preliminary examination, or whether it was in Circuit Court. I would have to look at the —

THE COURT: Wouldn't that be the difference?

MR. JOSEPH: Well, no, why should there be a difference, because we laid the foundation for our case —

THE COURT: Maybe there shouldn't but under the rules of the Supreme Court, isn't there a difference?

MR. JOSEPH: I don't think there is, because they have to show to the Examining Magistrate probable cause; they have to show a crime has been committed.

THE COURT: Have you ever read the record of the People vs. Moore?

MR. JOSEPH: Yes, your Honor, I have.

THE COURT: Or People vs. Pickett for that matter?

MR. JOSEPH: But your record may be one thing, but I don't know what the Supreme Court said on that particular subject. But in this case it is not a collateral matter. If you are going to believe this girl, and oh—there are eight or ten witnesses sworn,—let me see how many were sworn on behalf of the defendant,—Lois Morgan, we called her for cross examination, Richard McKinley Green, James Gillespie, Margaret L. Gillespie, Margaret Stefanski, Evelyn Cumberford, JoAnne Vance, and we had others, and the lower Court says, "No, I am not going to hear any more." Let me read that part to the Court, 140,—we are examining, and we examined this Mrs. Cumberford,—

> "I don't like to interrupt, but I am not interested at this time in your comments or observations on these matters. I asked you what the nature of the testimony of these people that you say are not here today would be. If it's on collateral matters I am not interested in hearing it."

Now, when the Examining Magistrate says we can't introduce testimony, and he won't hear it, and he calls this

all a collateral matter,—now, one or two of the witnesses, I have been checking on them, have since moved. Now, we have been prejudiced by this Court's action, and I move you at this time that either the case be quashed or be remanded so we can continue with the examination that we are entitled to. Now, they even denied us the right to have this exhibit in lower court. Mr. O'Rourke later realized it was a substantial right, and he granted it to us.

THE COURT: They denied what?

MR. JOSEPH: They denied us the right to even see this exhibit. When the girl was in the hospital there was a certain discharge that came from her body. It was sent to Dr. Backus for examination.

THE COURT: You are talking about an exhibit that was introduced?

MR. JOSEPH: It was not introduced, and it came out in the testimony.

THE COURT: Well then, just a moment,—let me get this straight. You have three motions here. One has to do with some things you want to see, right?

MR. JOSEPH: That's been taken care of, your Honor.

THE COURT: You are not urging that motion?

MR. JOSEPH: No, no; because Mr. O'Rourke later realized that we were entitled to see that exhibit.

THE COURT: Why were you entitled to see it?

MR. JOSEPH: Well, it is part of the case against us.

THE COURT: Suppose it is. You say it was not introduced as evidence in the case?

MR. JOSEPH: No; but we asked it be produced in the lower court. Maybe Mr. O'Rourke shouldn't have let me take it, I don't know, but he didn't give it to me. It stayed in his possession all during the time, his officers had complete charge of it.

THE COURT: Well, that's a novel question. You are just urging two motions now?

MR. JOSEPH: Two motions now, that's right.

THE COURT: One more question,—and you want it to be remanded?

MR. JOSEPH: That's right.

THE COURT: Alright;—

MR. O'ROURKE: If it please the Court, I would like to say at the outset, at the time the three motions were filed in this matter, upon discussion with Mr. Joseph it was my understanding that his primary objective was to secure the exhibit for examination by a pathologist of his choosing, and that the other motions he was not pushing too strenuously, and in view of that, we would let him see the exhibit.

The case has now been set for some weeks for trial. Mr. Joseph now urges these two motions, as to the question of whether or not the Examining Magistrate had enough evidence before him sufficient to bind him over.

I would call the Court's attention to the testimony found on pages 6 and 7, Lois Morgan's testimony,—she says, on

Monday, which turned out to be October 11th, she and Clarence Duprey went to Dr. David's office to see if she was pregnant, and upon examination Dr. David told her that she was about two and a half to three months pregnant. Page 11 he said he could perform an operation and it would be very expensive. Page 13 he said if she had come sooner the operation wouldn't have been so hard. Page 14, they went back on October 14th, at an appointed time of 8:15, and at that time Dr. David took $500 in his office, after he had secured the lights, with the exception of the room he worked in.

Page 19, the witness testifies as to the operation, something pulled from her stomach by instruments. Page 21, the doctor put packing in her. Page 37, Duprey is testifying. He is the man responsible supposedly for the pregnancy, if it existed. He corroborated the testimony of Lois Morgan. He says on page 40, that Dr. David said she was pregnant, and Duprey was to raise the money, $500, for the operation, and they made an appointment for October 14th.

As to the question of quashing this matter, whether or not there was sufficient cause to bind it over, we call to the Court's attention the case of People vs. Simard, 314 Mich. 624, and at page 627, there the question was as to the sufficiency of evidence;—

> "At the preliminary examination, the girl testified that she was taken to defendant's office early in the evening of October 27, 1944;"—

THE COURT: A little slower.

MR. O'ROURKE: "That she did not know what happened, but that the examination was very brief, and that the following night she went to the defendant's

office; that he placed her on the operating table; that he used 'spreaders,' and all she saw were the 'spreaders;' that she gave him $150 in bills; that when he came out from his inner office he stated that miscarriage had already started, and that he did not have to perform the operation; that during the same night she had a miscarriage. She also testified that at the first interview defendant gave her a brown pill which she believed was a physic. The mother of the boy testified that she wanted the boy and girl to marry, but the girl's mother objected; that the doctor said he did not want to handle the money, but they should leave it lying somewhere; he demanded $150; the doctor took the girl into his office and the girl was in there about a half hour; that he gave the mother credit for the $5 paid for the first examination but demanded the $145 balance before he would perform the operation, that this amount was paid to him; that the second evening when he came out with the girl, he stated that the operation was unnecessary, but he kept the money."

The Court says:

"The testimony was sufficient to bind the defendant over for trial notwithstanding appellant's contention to the contrary."

That they add the statement of the girl she visited the doctor's office, and the Court does not repeat she said she was pregnant, but the man said she was pregnant, the defendant; that he used spreaders on her, and that he testified, she said, the miscarriage had already begun, that he didn't have to perform an operation. Based only on that, the Supreme Court felt the Examining Magistrate had sufficient to bind the defendant over.

As to the question of whether this Court may rule on a motion of this nature, as to whether or not the Examining Magistrate had probable cause, I would cite the case of People vs. Karcher, 322 Mich. 158. The case involved almost identical questions with the ones involved in this case, and if the Court will bear with me, I would like to read from the case:

> "After preliminary examination defendant was bound over to circuit court for trial on a charge of securing an abortion. From an order of the circuit court granting defendant's motion, before trial, to dismiss for lack of probable cause the people appeal."

The Court says:

> "There can be no doubt, and the people do not dispute defendant's contention, that a circuit court has jurisdiction to consider a motion to dismiss a criminal case after the defendant has been bound over to that court upon preliminary examination by the examining magistrate. 3 Comp. Laws 1929, Sec. 17290 (State. Ann. Sec. 28. 1016); Barnard v. Judge of Superior Court" and others.

> "It is the defendant's theory that on this appeal, in the nature of certiorari, this Court should not disturb the finding of the circuit court if there is any evidence in the record to support it."

And again the Circuit Court found the Examining Magistrate had sufficient evidence to find probable cause.

> "What are the limitations upon our inquiry and what tests are to be applied on certiorari?"

In Jackson vs. People, 9 Mich. 111, this Court said:

> "While we do not weigh the evidence to determine the facts, we do examine it to determine, as a matter of law, whether it justifies the action of the circuit court. Essential to that determination is a consideration of the nature of that court's action. In effect, it constituted a holding that the magistrate was guilty of an abuse of discretion."

And the Court said:

> "The office of a certiorari is not however to review questions of fact, but questions of law. And in examining into the evidence the appellate court does so not to determine whether the probabilities preponderate one way or the other but simply to determine whether the evidence is such that it will justify the finding."

And as said in People vs. Dellabonda, 265 Mich. 486, at page 491:

> "Primarily the question of probable cause is for the consideration of and determination by the examining magistrate. This Court may not agree with the findings of such magistrate but it has no right to substitute its judgment for his except in case of a clear abuse of discretion. We cannot say there was an abuse of discretion on the part of the examining magistrate and decline to hold the erroneously bound appellant over for trial."

The case defines probable cause to be, at page 164:

> "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is

guilty of the offense with which he is charged. 3 Bouvier's Law Dictionary (Rawle's 3d Rev.) p. 2728."

"Complainant's admitted attempt to obtain money from defendant and other aspects of her testimony stressed by defendant go to her credibility, are proper subjects of inquiry and of argument by counsel on trial, to be considered by the jury in determining the weight to be accorded her testimony. Crippen v. People, 8 Mich. 117, People vs. Murphy, 93 Mich. 41; People v. Rice, 103 Mich. 350. Testimony as to these matters affecting the complainant's credibility having been received into evidence before the magistrate, it was no abuse of discretion for him, nevertheless, to believe her testimony which established probable cause. It is, therefore, not the function of the circuit court or this Court to substitute its judgment for that of the magistrate in that regard."

Now, the situation as its effect in two ways here. At the conclusion the Court says that,—now, Mr. Joseph objects to the fact the Court allegedly limited him in his cross examination, in the examination of witnesses brought here for the purpose, and solely for the purpose of impeaching the credibility of the complaining witness. This Court in the case cited says that those witnesses may testify at an examination, but if the examining magistrate finds probable cause, if he believes the girl,—whether it is his job to believe the girl or whether to believe the other witnesses,—in this case now before the Court, the examining magistrate bound the defendant over and believed the testimony of the girl and Mr. Duprey; and I submit to the Court that Mr. Joseph cannot show by the record that this court, this examining magistrate in this case did not have probable cause before him when he bound the matter over, and did not abuse his discretion.

We request the two motions, the motion to remand, and which merely calls for introduction of further reputation evidence, or evidence which would tend to test or impeach the credibility of the complaining witness, that that motion be denied; and the motion to quash be denied, and that there was no abuse of discretion by the examining magistrate.

MR. JOSEPH: Your Honor, I would like to read from this People vs. Simard. The case was reversed by the Supreme Court and sent back for trial. Now, in this case there was no argument made about the pregnancy of the girl the crime had been committed upon. However, let's read a little more in this case here. It seems people told two different stories, and they were limited—this is on the trial, they were limited on cross examination.

> "At the trial they told all the details and the prosecution had the right, in fact, was in duty bound, to bring out all of the facts and ask the witnesses about any discrepancies. It was desirable to bring out an explanation and clarification of their testimony at the preliminary examination."

The Supreme Court says that—at page 629:

> "The defense in its cross examination of the boy's mother elicited an admission from her that she knew she was violating the law in securing the performance of a miscarriage. When asked whether she had been arrested, an objection by the prosecutor was sustained. This was error. Under the circumstances this information was pertinent to show the interest of the witness, as she was an accomplice, and her son was guilty of statutory rape."

And then they go on and say,—and in this case, which made it clear error, they asked him about some other crimes on cross examination, and the Supreme Court says, "No, you can't do that." So in that Simard case in which Mr. O'Rourke relies upon, they say it is important that all these facts be brought out on the examination. Now, that particular situation,—we had about ten witnesses down there at the Court, which extended over a two day period. Now we understand two or three of our witnesses that were available at that time, have now since departed for parts unknown. We have been denied a substantial right; we have been denied information that this court and this jury should have. At least we could read our testimony in the record to show to the jury the condition. Now, Mr. O'Rourke says we can bring that out up here in Circuit Court.

Now, your Honor, we haven't got that testimony today. Our very defense is this girl is such a prevaricator that nobody will believe her under oath, and that was the character of the testimony that was introduced in lower court. We don't have the benefit of that testimony, some of that testimony, today. Assuming this girl was crazy, assuming she was an incompetent, and she makes an allegation that so and so committed arson, or rape, or anything else like that on her, and we bring in testimony showing the girl is a natural born liar, is an examining magistrate going to say, "Well, I will reach into a bag of tricks, and say to this man, "You have got to go to trial." To me, that isn't right. They haven't shown probable cause, and furthermore, they haven't shown pregnancy in this woman. Are they going to rely on his testimony to do it? Then they are convicting him upon his own admissions, and that is strictly contrary to the law. For them to show pregnancy they have got to show it by some other source. I move you the case be dismissed.

MR. O'ROUKE: I might say one more thing, —

THE COURT: No, you needn't, — we have other work to do. I take it, Mr. Joseph, you are abandoning the motion with respect to exhibits?

MR. JOSEPH: I am, your Honor, because Mr. O'Rourke has made them available to us.

THE COURT: Alright, I just want the record clear.

MR. JOSEPH: That's right.

THE COURT: I have gone over the examination of the record of the examination in the lower court. I find the following interesting history. The respondent was arraigned and stood mute on October 22nd, 1954; that an examination was set for October 28th, 1954, at which time, I believe, in compliance with the request of the respondent's counsel the case was adjourned to November 4th. On November 4th there was a hearing held, and testimony taken, and then the case was adjourned to November 26th, and then on the 26th it was adjourned to December 3rd.

On December 3rd there was an examination, a further examination, and testimony taken, and then it was adjourned to December 9th, and from December 9th to December 23rd. Testimony was taken on December 23rd, and then on December 24th, the next day. The case was bound over to Circuit Court for arraignment on January 17th.

I am wondering how many cases it would be possible to get through preliminary examination in this circuit if each case that appears down there, of equal serious-

ness, — I believe this carries a maximum of four or five years in prison, if we use that yardstick, — let's assume that every case as serious, or more serious with respect to penalty, would require as long to negotiate and prepare the examining stage as this one, I hazard a guess we wouldn't have more than seventy-five cases in Circuit Court a year, so we would have a backlog of something like five years in five years, which may not sound apropos, but I think it is.

The case has a record, as I count the pages, of 250 pages. Now, a record of 250 pages would do justice to the average jury trial tried in Circuit Court. For counsel on behalf of the respondent in this case to say he has not had an examination of the scope he was entitled to is somewhat torturing the facts. The record would indicate they had more than the usual leeway on cross examination of People's witnesses; that according to the statement of counsel, he said he put on eight or ten witnesses who testified to the bad character of the complaining witness.

It appears to me the examining magistrate in this case went to unusual lengths to give the respondent in this case his rights. In fact, the rights and privileges he attained, according to the record, are unusual.

Now, to get the gist of the motion, — the motion to quash, and the motion to remand, — my question is concerning some of the authorities you cited, Mr. Joseph, for the proposition that the defendant has a right to cross examine the witnesses, and the scope of it, of course, pertaining to cases in Circuit Court on trial. I don't intend to hold by that that you didn't fully exercise your right to cross examine here. I haven't gone over the cases that closely, but now to tie in my remarks with those few cases we could possibly process through lower court into

Circuit Court, we would give each respondent this kind of opportunity for prolonging examination, we need only look at what the Supreme Court and legal authorities have felt that the office of the preliminary examination to be.

In the first place, it is not a trial, and the rules and principles which govern with respect to the framing and construction of the preliminary pleadings, and to the scope and import of the trial issues, the relevancy of evidence, are not strictly applicable to the preliminary examination. My understanding of the background and history of the preliminary examination is that it was intended to take the place of something we had long before that, long before the preliminary examination came into existence, and that was that we used to have grand juries as a method for ascertaining who, if anyone, should be held to trial.

Now, the preliminary examination, as I understand it, is essentially to take the place of the presentment by a grand jury under the laws previously existing, in what? In protecting the defendant from being subjected to the indignity of a trial, a public trial, before probable cause had been established against him by witnesses under oath.

Now, one need only conjure up an image of what would happen if a grand jury of twenty-one citizens, laymen, to draw some line as to what is expected to be required before an examining magistrate. In other words, a preliminary examination is not intended to determine whether the respondent is guilty or innocent, but is purely an inquiry to ascertain whether the crime charged has been committed, and whether there is reasonable grounds to believe the accused committed it.

Now, does the magistrate have to believe one side or another? I don't think so. In the first place, he does not act in an official capacity in a technical sense. He is not called upon to ascertain, weigh the evidence, as a petit jury might, or to discharge the accused where there is a conflict of evidence.

In other words, the prosecution does not have the burden of establishing the guilt of the respondent beyond a reasonable doubt before the examining magistrate, but only to offer proof that an offense not cognizable by a Justice of the Peace has been committed, and that there is probable cause to believe the defendant guilty thereof. And of course, a trial court may not substitute his judgment for that of the examining magistrate except in case of a clear abuse of discretion.

Now, what does an examining magistrate have to do before he can bind one over? It is my feeling that when we talk of probable cause, what we are talking about is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person charged is guilty of the offense with which he is charged; and I think the record in this case, and the examination held in the lower court more than fully supports the finding by the court, and his action in binding the matter over for trial.

Accordingly, the motion to quash will be denied, as will the motion to remand to the Municipal Court for further examination.

MR. JOSEPH: The Court has ruled, but may I make a comment?

THE COURT: Yes.

MR JOSEPH: In the Pickett case, your Honor, there was the same kind of testimony introduced in the lower court. That testimony was offered again in Circuit Court, and Judge Dehnke, — and was approved by the Supreme Court, — said, "Your rights are out the window if you don't exercise them down in the lower court." Now, it seems to me, your Honor, that in view of the Pickett case, which the Court remarked about, — in view of that Arney testimony, that a defense counsel has a two edge sword to worry about now in the lower court. Either you make your record down there or you are bound by that testimony in Circuit Court and you can't impeach it. I just want to comment about that.

THE COURT: Well, of course, that's been true for many years.

MR. JOSEPH: Well, maybe it is true. It seems to me the respondent has a very serious job, and an attorney representing a respondent has a very serious job. Now, you say this is a long record. It is a serious matter to this man. It is a serious matter to any man, whether it takes one week or takes two months to have an examination.

THE COURT: I can appreciate your position should these witnesses be—

MR. JOSEPH: And we have lost two of them now.

THE COURT:—be called on trial, or be called and found they are not here to answer, or being called refuse to testify, and under the ruling of the Supreme Court then being held to not be available even though they are in the court room. I think the Supreme Court has made rulings which will

prove to be rather troublesome to them some day, and certainly trial courts before that time, because I can foresee possibilities developing in this case.

MR. JOSEPH: Your Honor, I would like to appeal the ruling of the Court. Now, can I have an understanding with the prosecutor before going to trial? I am very serious about appealing it because I think this is a question the profession is vitally interested in.

THE COURT: Well, that's up to the prosecutor. He sets the cases.

MR. JOSEPH: Well then—

THE COURT: If you are asking me, the answer is "no." I wouldn't grant you an adjournment for that purpose.

MR. JOSEPH: Well,—

THE COURT: Lately Miss Papp appealed a ruling somewhat along the same line, only in that case she had more grounds, I think. She was hired a day or two before the examination. My recollection is that on the adjourned date,—well, first of all,—that a day or two before the examination she was hired, she asked for an adjournment and was refused; that thereafter the People went to a hearing. That she said that she was not in position to intelligently protect her client by cross examination because she didn't know enough of the case of the witnesses, that she asked that the matter be adjourned and the witnesses be required to re-attend. This was denied her. That upon the adjourned date one would have reason to believe that at least one of the witnesses was present, but the examining magistrate refused to place him on the stand to subject him to cross examination, although he was the officer in charge

of the investigation of the case, so he must have been there, I assume from practice, so she never asked a question of either of the two witnesses sworn against her client on preliminary examination.

Now, the reason for not granting you an adjournment is first,—that's a stronger case than yours, in my opinion. Second, after waiting for, I believe sometime,—I don't know how long now, two months or so, the Supreme Court sent the matter down with an order that some of us had difficulty understanding, and that was that the case was remanded,—

MISS PAPP: No, the motion,—

THE COURT: —for the court to make a ruling on the merits of the motion. I had assumed that's what I had done; and I think the matter comes up this afternoon, and I am going to again try to make a ruling on the merits of the motion as I understand it. But this is a preliminary matter, and I think the Supreme Court generally prefers to review the questions if they are raised after trial.

It is now twelve, so we will recess until two.

Appendix "C"

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

THE PEOPLE OF THE STATE OF MICHIGAN -vs- T. GEORGE DAVID, Respondent.	No. 14367

PROCEEDINGS HAD in the above entitled cause, before the HON. STEPHEN J. ROTH, Circuit Judge, on the 21st day of May, 1956.

APPEARANCES: MR. JEROME F. O'ROURKE,
Prosecuting Attorney,
for the People,

MR. JOSEPH R. JOSEPH,
Attorney for Respondent.

MOTION FOR NEW TRIAL

THE COURT: Go ahead with your motion, Mr. Joseph. I undersand you have a motion.

MR. JOSEPH: Yes, I have a motion for a new trial, your Honor. The basis of my motion is, your Honor, that the statute under which this man was convicted is unconstitutional. The Court remembers the—

THE COURT: I also remember the ruling.

MR. JOSEPH: And I also move the Court that under the particular statute that it had been pre-empted by the passing of a later statute, which applied only to physicians. I remember the Court's ruling on that again; and I also move you the verdict is against the great weight of evidence because there is testimony introduced in the record that they would not believe this young lady under oath, and third, the evidence that was offered in evidence, that the exhibits that were offered in evidence were not sufficiently connected up with the respondent so as to charge him with that; and I feel there was prejudicial error committed in allowing those exhibits to come in.

I also urge upon you too the fact that the warrant was issued without any basis to justify the issuance of the warrant. It was issued on information and belief, and without any showing by the examining magistrate.

I just want to protect the record on that. If the Court cares to, I will come back and argue, or we will—I didn't want to take the Court's full time,—maybe I should,—

THE COURT: Well, my recollection is that of the motion presently raised, with one exception,—well, with two exceptions, has previously been raised and decided adversely to you. The two instances that are exceptions to that are, you are alleging that the judgment of the Court was contrary to the great weight of the evidence, and the other, that he made some mistakes in the admission of testimony in evidence.

With respect to those, I will make the rulings which are consistent with the previous rulings on the other motions. That is, I will deny them. I think the judgment of the

Court was in accordance with the great weight of the evidence. So I will pass sentence at this time.

MR. JOSEPH: Step up here, doctor.

(Respondent came forward)

THE COURT: Do you have anything to say, you or your counsel, before I impose sentence in your case?

RESPONDENT: Yes.

MR. JOSEPH: I have nothing to say, your Honor. I think the Court understands the facts.

THE COURT: Well, doctor, your history is that of a young man who was ambitious, who worked hard and diligently to obtain his educational ranking, and to obtain his degree in medicine. You graduated from an outstanding medical school, Rush Medical College at the University of Chicago, in 1931. Your internship was in St. Marys Hospital in Detroit. Then you acted as resident physician in Palestine, a British Hospital, and until 1941 you practiced in Detroit, and came to Flint in that year.

It appears from the history you have been addicted to gambling, so I suppose much of your income has gone for that purpose.

There is presently on file against you a charge before the Michigan State Board of Registry and Medicine, which apparently has not been processed until after completion of this case.

The facts in the case itself do not present anything unusual. A typical case of a woman of loose morals, who had,

according to her own testimony, lived while married to another man, with at least two others, as my recollection serves me, and as a result of the cohabiting with one of them apparently she became pregnant. She sought to remove the source of embarrassment and contacted you. Except for the fact she repaired to a motel and then to a friend's home, and became ill, the Court would probably have never heard of this matter, because she and her boy friend sought your services; and had nothing ontoward developed, that would have been the end of the matter.

The punishment you will receive in this case, in a manner, I suspect, will be administered by the State Board of Registration. The sentence of the Court is you pay a fine of $500; costs of $250; or serve six months in the County Jail.

MR. JOSEPH: Your Honor, I wonder if the Court would set bail pending appeal?

THE COURT: What is the bail now?

MR. JOSEPH: $2500.

THE COURT: It may continue in that amount.

MR. JOSEPH: Thank you.

RESPONDENT: That is all, your Honor?

THE COURT: Yes.

RESPONDENT: Thank you.